

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

4 SINGULAR COMPUTING LLC, )  
5 Plaintiff ) Civil Action  
6 ) No. 19-12551-FDS  
7 vs. )  
8 GOOGLE LLC, )  
Defendant )

10 BEFORE: CHIEF JUDGE F. DENNIS SAYLOR, IV

MOTION HEARING

John Joseph Moakley United States Courthouse  
1 Courthouse Way  
Boston, MA 02210

June 10, 2021  
1:30 p.m.

Valerie A. O'Hara, FCRR, RPR  
Official Court Reporter

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1 APPEARANCES:

2 For The Plaintiff:

3 Prince, Lobel, Tye, LLP, by PAUL J. HAYES, ESQ.,  
One International Place, Boston, Massachusetts 02110;

4 For the Defendant:

5 Keker, Van Nest & Peters LLP, by MATTHIAS A. KAMBER, ESQ.,  
6 and ANDREW BRUNS, ESQ., 633 Battery March Street,  
7 San Francisco, California 94111.

8 ALSO PRESENT: Matthew Hollander Google  
9 Hen Makish, Goggle

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1 PROCEEDINGS

2 THE CLERK: Court is now in session in the matter  
3 of Singular Computing vs. Google, Inc., Civil Action  
4 Number 19-12551.

Participants are reminded that photographing,  
recording or rebroadcasting of this hearing is prohibited  
and may result in sanctions.

8                   Would counsel please identify themselves for the  
9 record, start with the plaintiff.

01:31PM 10 MR. HAYES: Paul Hayes for the plaintiff.

11 Good afternoon, your Honor.

12 THE COURT: Good afternoon.

13 MR. KAMBER: Mathias Kamber on behalf of Google.

14 Good afternoon, your Honor.

15 THE COURT: Good afternoon. All right. This is a  
16 hearing on Google's motion to stay. Mr. Kamber, are you  
17 taking the lead?

18 MR. KAMBER: I am, your Honor.

19 THE COURT: Okay. The floor, metaphorically  
01:31PM 20 speaking, is yours.

21 MR. KAMBER: Thank you. One housekeeping matter,  
22 your Honor, before we begin. There are some slides that  
23 Singular, the plaintiff, has provided to potentially show  
24 during the hearing, and there's an issue with respect to  
25 three or four of the slides containing confidential subject

1 matter. It's fine for the Court to see it. It's a little  
2 awkward in these virtual court instances to seal the  
3 courtroom. I'm not sure how your Honor would like to  
4 handle that.

5 We would like to maintain the confidentiality and  
6 don't think that they're particularly crucial. I think you  
7 have copies of them, so it's possible that you could just  
8 look at them and they could be referred to in a very  
9 generic way during that part of the argument, but I really  
01:32PM 10 defer to you in terms of how you handle that type of type  
11 of thing.

12 THE COURT: Well, the easiest thing to know if  
13 we've accounted for everyone on the call. Maybe we  
14 haven't. There are, I think, six unidentified people here  
15 or people whose videos aren't present who are part of the  
16 Court in one form or another, but...

17 MR. KAMBER: I'm certainly happy to identify a  
18 number of those as being associated with us at Google.  
19 That's about half of them, I think, but I'm not sure about  
01:33PM 20 the other names. Perhaps someone could help us there.

21 THE COURT: Let's see if we can do that, and then  
22 someone from the press or whatever is on, maybe handle it  
23 some other way. Who is on the call that's associated with  
24 Google?

25 MR. KAMBER: Sure, Matthew Hollander,

1 Andrew Bruns, Hen Makish, and that's it for us, I believe.

2 THE COURT: Okay. And Mr. Hayes, anyone present  
3 on behalf of Singular as far as you know?

4 MR. HAYES: Yes, your Honor, the only people we  
5 have are Singular lawyers and a paralegal.

6 THE COURT: But they're all in the room with you,  
7 correct?

8 MR. HAYES: Yes, no one else is on the call. I'm  
9 not going to make that person to identify themselves who's  
01:34PM 10 on the call, so let's why don't I -- you say I do have  
11 copies of these, Mr. Kamber?

12 MR. KAMBER: Yes, I believe Mr. McKillop received  
13 a copy of those slides earlier this morning.

14 THE COURT: And are they on the docket, Matt?

15 THE CLERK: Judge, I forwarded you these slides  
16 probably about an hour and a half ago.

17 THE COURT: All right. I'll call up that e-mail,  
18 and we'll handle it that way. Okay. Got it. Okay. All  
19 right. Mr. Kamber.

01:34PM 20 MR. KAMBER: Thank you, your Honor. Again,  
21 Mathias Kamber on behalf of Google. As the Court now  
22 knows, the patent trial and the appeal board has  
23 interpreted inter partes review as to all three patents and  
24 all four asserted claims.

25 The institution decisions are particularly

1       thorough in this case. They address all of the issues that  
2       Singular raised in its preliminary responses, and they  
3       conclude that Google has a reasonable likelihood of  
4       prevailing on its validity challenges.

5                  Given the stage of the litigation, the likely  
6       impact of those IPRs, and the absence of undue prejudice,  
7       Google respectfully asks the Court to stay this case while  
8       the PTAB considers the IPRs, so let me start with the first  
9       factor, which is the stage of the litigation, including  
01:35PM 10       whether discovery is complete and a trial date has been  
11       set.

12                 The parties obviously have some disagreement about  
13       how far along we are in discovery, but there really can't  
14       be any disagreement that much remains to be done, and  
15       discovery is certainly nowhere near complete. Only three  
16       of 32 fact depositions have been taken thus far. Many more  
17       depositions are on the calendar or in the process or being  
18       scheduled for the coming six weeks, but that doesn't  
19       include the 30(b)(6) depositions which are also going to be  
01:36PM 20       the issue of perhaps some dispute.

21                 THE COURT: Let me ask a question. Suppose I  
22       granted your motion, could those three depositions be used  
23       in the IPR proceeding?

24                 MR. KAMBER: I don't think we would have any  
25       objection to those being used in the IPR proceeding. I

1 think one of them would be rather irrelevant. I'm not sure  
2 about the other two. The other two I think might be  
3 tangentially relevant, but I don't think we would have any  
4 objection to them being used in the context of the IPR  
5 proceedings, if that was appropriate.

6 THE COURT: What about document production?

7 Again, I'm making no ruling, obviously, about what would be  
8 admissible or relevant or anything but just as a general  
9 proposition?

01:37PM 10 MR. KAMBER: On document production, I don't know.  
11 Frankly, I'm not a PTAB or IPR lawyer, and I'm not sure  
12 exactly how document productions from a district court  
13 litigation can or would be used in the context of a PTAB  
14 proceeding.

15 There is some limited discovery in PTAB  
16 proceedings I know, and to the extent that they want to use  
17 certain documents, I think we would absolutely discuss that  
18 issue with Singular, but I don't think the entirety of the  
19 document production is really a part of the PTAB  
01:37PM 20 proceedings so far as I understand them.

21 THE COURT: That's not really the question, not  
22 whether that's part of the proceeding, but suppose, again,  
23 suppose I grant your motion and Singular has, you know,  
24 Googled a document that they think is critical or has some  
25 critical statement from a witness in a deposition, putting

1 aside whether the PTAB would allow it, I have no idea, but  
2 would Google object to say, no, no, that document was  
3 produced in the litigation, therefore, it can't be used in  
4 the PTAB proceeding?

5 MR. KAMBER: Your Honor, no, I don't think we  
6 would object to confidentiality and that it remains under  
7 some terms of a protective order, which might be slightly  
8 different or complimentary in the PTAB proceedings.

9 THE COURT: Okay. I'm sorry, I interrupted you,  
01:38PM 10 go ahead.

11 MR. KAMBER: No, no problem, your Honor. Related  
12 to this factor, I wanted to emphasize this first factor,  
13 two points in response to Singular's claim that it's really  
14 only Google that could or would benefit from a stay.

15 First, many third parties would benefit from a  
16 stay, including scientists and professors at Sandia, at  
17 M.I.T., and lots of third-party companies. As we  
18 understand it, based on Singular's representations, they  
19 really only have this single employee and potential  
01:38PM 20 witness, Dr. Bates.

21 Accordingly, the other 15 depositions that we're  
22 pursuing right now are of third parties, and protecting  
23 third parties against unnecessary discovery I think is  
24 chief among the aims of the Court.

25 Second, the Court itself would also benefit from a

1 stay. Without casting blame, this has been and probably  
2 will continue to be a contentious case that has consumed a  
3 lot of court resources.

4 We've been referred to Judge Cabell in a number of  
5 instances, and although he's mostly seen it our way, we  
6 recognize Singular also has a motion pending and perhaps  
7 more to come, and so in light of the IPRs, overburdening  
8 that limited resource would be wasteful, and along similar  
9 lines, a stay would make it unnecessary for the Court to  
01:39PM 10 rule on the pending claim construction issues presuming  
11 that order isn't already close to done as well.

12 So, in short, this motion doesn't reduce down to a  
13 balancing of interest between just Google and Singular, as  
14 Singular suggests. Given the high probability that some or  
15 all of the claims are going to be held invalid, the  
16 statistics suggest about 80 percent, the stay request is  
17 equally, if not more, about considering the burdens on  
18 third parties and the Court.

19 Beyond that, of course, there's still expensive  
01:40PM 20 expert discovery, there's motion practice, there's pretrial  
21 filings ahead of us all, and so echoing along, this  
22 discovery is not complete, and no trial date has been set.  
23 Accordingly, this first factor favors granting a stay.

24 Turning to the second factor, your Honor, whether  
25 a stay will simplify the issues in question and trial of

1       the case, there's no question that it will do so. On the  
2 one hand, if the asserted claims are ultimately ruled  
3 invalid by the PTAB, then a stay will have avoided much  
4 unnecessary work.

5                  On the other hand, if the asserted claims are not  
6 ruled invalid based on the grounds presented, then the  
7 issues going forward will be narrowed, that is, the  
8 statutory estoppel will preclude Google from further  
9 litigating arguments that it raised or reasonably could  
01:41PM 10 have raised at the PTAB, and the Court will also benefit  
11 from additional prosecution history, and its further  
12 elucidation of the claim scope here.

13                  Simply put, there's no way in which the issues  
14 wouldn't be simplified by letting the PTAB proceedings run  
15 their course, and Singular has not argued otherwise.

16                  Rather, what Singular has argued is that the PTAB  
17 proceedings won't resolve all of Google's defenses. That's  
18 true, but it's beside the point for this second factor,  
19 which is just the question of whether it will simplify.  
01:41PM 20 There's no question that it will.

21                  The third factor is whether a stay will unduly  
22 prejudice or present a clear tactical advantage to the  
23 nonmoving party. Notably, the question is not prejudice  
24 but undue prejudice attributable to either dilatory conduct  
25 or the absence of legal remedies.

1                   Singular doesn't argue either point in its  
2 briefing, nor could it. Google wasn't dilatory in filing  
3 its IPR petitions within two months of Singular's  
4 identification of the asserted claims and well before the  
5 statutory deadline, nor did Google delay even a little in  
6 seeking a stay.

7                   We first sought a stay very shortly after filing  
8 the petitions, and we raised the issue with your Honor at a  
9 status conference, and then we renewed our motion to stay  
01:42PM 10 after the institution decisions came down.

11                  There's also no argument that legal remedies would  
12 not be impacted by a stay. This is the case about money  
13 damages, and no injunctive relief has or could be sought.  
14 Indeed, as we noted in the briefing, Singular has conceded  
15 that Singular and Google are not competitors.

16                  And as to Singular's concern in the briefing about  
17 fading memories, it's neither credible nor a recognized  
18 basis for finding prejudice. Singular waited for years  
19 after Google publicly launched the accused products before  
01:43PM 20 filing suit, seemingly unconcerned about the fading  
21 memories at that point, and then Singular's repeated  
22 arguments that memories will fade while this case is stayed  
23 for years is belied by the fact that the PTAB is  
24 statutorily bound to issue its final written decisions  
25 approximately 11 months from now. That's the length of the

1 stay that we are asking for here today.

2 So, in sum, your Honor, all three relevant factors  
3 weigh in favor of a stay. We've cited numerous briefs,  
4 numerous, excuse me, cases in our briefs where courts,  
5 including this court, have granted stays in such  
6 circumstances and even in cases that were further along or  
7 where the institution decisions were less exhaustive.

8 Singular hasn't addressed any of those cases in  
9 its opposition and certainly has not identified any reasons  
01:44PM 10 under the three applicable factors as to why the Court  
11 should rule any differently here. Thank you, your Honor.

12 THE COURT: All right. Thank you. Mr. Hayes.

13 MR. HAYES: Good afternoon, Judge. I will use  
14 these slides because I think they may help the Court in  
15 this discussion.

16 THE COURT: All right. Let me call them back up.  
17 Hold on.

18 MR. HAYES: The first one is on page 2. It's  
19 entitled, "Justice Delayed is Justice Denied," and I think  
01:45PM 20 that that is a relevant factor here in the First Circuit,  
21 at least people go by that mantra, and I think if we look  
22 at just the facts of the case, we have the case now pending  
23 for 18 months. As scheduled, if nothing is done, the  
24 parties will be ready for trial in nine months, no  
25 question, February.

1           We'll be ready. We've tried to be ready from day  
2 one. In any event, we'll have a trial say in February on  
3 all issues, 101, 102, et cetera, so we're done and one  
4 appeal. If this case is stayed, you won't be ready for  
5 trial until at least February, '25, which is three years  
6 from today.

7           First, you have the IPR, which is 12 to 18 months,  
8 and given this case with three patents, 99 claims or  
9 something to that effect, the government is certainly going  
01:46PM 10 to utilize the 18 months, then you have an appeal.

11           There's no question that Google is going to want  
12 to stay it after the IPR decision. They'll tell you, oh,  
13 it's only just to them, but as we put in the brief, their  
14 history and litigation strategy is absolutely clear,  
15 they're up for an appeal then.

16           So then we go for a CAFC Appeal Number 1. After  
17 that we come back to the District Court in '25, we have a  
18 trial, and then we go for CAFC Appeal Number 2, and the  
19 point I'd like to make is just simply this, having to wait  
01:46PM 20 5.25 years between filing a complaint and getting a trial,  
21 not just an appeal, a trial, we think is justice denied  
22 under any circuit law, just common sense.

23           The next slide, which is page 3, is concerning an  
24 even balance, and the reason I bring this up is the  
25 Supreme Court case, *Atlantis*, which calls for some type of

1 thinking about some type of even balance between the  
2 parties here.

3 You just look at this now. Bates, there's no  
4 question follows the rules. Bates gets a patent, gets an  
5 invention, receives it, provides, et cetera, and is issued  
6 three patents under the subject of the case, and he does  
7 all this while working with the government, mainly the  
8 U.S. Navy to develop this prototype.

9 Pursuant to an NDA that Google prepared, he  
01:47PM 10 discloses the invention in 2011 and 2013 to Google at  
11 Google, at their request.

12 Upon disclosure, his top engineers, these are the  
13 top people at Google, look at the invention, they call it a  
14 or characterize it as a, quote, "potential moon shot." A  
15 moon shot to Google is a big thing, something that could  
16 change the world. That's the characterization.

17 The next characterization by another --

18 MR. KAMBER: Your Honor, I'm sorry, I'm very  
19 sorry, Mr. Hayes, to interrupt. These are the -- this and  
01:48PM 20 the next two slides are the ones that have these quotes  
21 from confidential Google documents, and I think perhaps  
22 they could just be talked at a higher level rather than  
23 direct quotes and much more generally.

24 THE COURT: Well, hold on. It may be  
25 confidential, but I don't see these quotes as revealing a

1 trade secret, and it's limited to these quotes. I don't  
2 see anything confidential or proprietary about this. It's  
3 an opinion that you say is taken out of context, but I'm  
4 going to let him keep going. Go ahead.

5 MR. HAYES: Thank you, Judge. By the way, when it  
6 says, "incredibly cool," that is from one of the leaders of  
7 Google Brain, which we'll get into a second, and then the  
8 other generates excitement to the architecture, et cetera.

9 These are all -- as the next slide shows, and this  
01:49PM 10 is the slide from Dr. Teller, where he characterizes this  
11 as a potential moon shot, right, he's in charge of Google  
12 basically X at the time. He's the man, he's the big wig  
13 that's in charge of all of this, all right. This is not a  
14 normal janitor, as my Brother sort of alluded to in his  
15 brief.

16 Now, we excluded that because you have it as an  
17 exhibit, but we've excluded it from the slides because it's  
18 marked confidential.

19 The next document is an e-mail from none other  
01:50PM 20 than Andrew Eden.

21 THE COURT: I'll read it. Let me just read it  
22 here. I don't see a reason to get into the details in this  
23 presentation.

24 MR. HAYES: Okay. Fine, your Honor.

25 THE COURT: I mean, details of the actual e-mail.

1                   MR. HAYES: Okay. You should note that this is an  
2 e-mail from Ng to Bates. This isn't confidential, it's to  
3 Bates, but, anyways, and the next document is of the same,  
4 excuse me, from one of the top business developers,  
5 et cetera, praising Bates' architecture that's the subject  
6 of this case.

7                   Now, we compare that, and this is now slide 7, and  
8 now I'm comparing that to none other than the acts of  
9 Google. Google didn't follow the rules. They copied  
01:51PM 10 Bates' invention, they launched the product that's the  
11 subject of the case for the use, internal use in September,  
12 2017 with full knowledge of the patents-in-suit, the '273  
13 and '156 patent, and what do they do?

14                  Their IP counsel knows of the patent, they launch  
15 the product, and they do absolutely zero, nothing, as you  
16 can see from their response to this interrogatory.

17                  So I think that in the end, which is the next  
18 slide, I think this is if we're talking balance here, we're  
19 talking a stay of three years. Bates now goes from 65 to  
01:51PM 20 68, his aspirations as you can see from his declaration,  
21 his will to flight will fade, that's Google strategy while  
22 he waits a day in court five years after he filed the  
23 complaint.

24                  Now, I think that if we talk about that in the  
25 interim, Google continues to use the invention, save at

1       least 8 billion a year from not having to build more data  
2       centers, et cetera, and we humbling think that that is,  
3       quote, "not an even balance to deal with."

4               Now, if we get to the other factors or the factors  
5       of the stage of the proceeding, et cetera, the first slide  
6       of interest is Slide Number 10, and that says on the top,  
7       "We are not in the early stages of litigation."

8               If you look at that slide, Judge, this is  
9       everything that's been done is in green except the fact  
01:52PM 10      that discovery ends in July, next month. We have completed  
11       three-quarters of the schedule that you issued on day one  
12       18 months ago.

13               Now, Google, as my Brother says, oh, the  
14       depositions and all the rest, you realize that they have  
15       not noticed a single solitary fact deposition in 18 months?

16               Bates is, as he said, the sole person in the  
17       Singular group, so to speak, or company, they have never  
18       noticed his deposition. They have ragged the pot  
19       continuously, and that's obvious as I think we'll get into  
01:53PM 20      it.

21               But if we look at it, we are three-quarters,  
22       that's just the fact, is done, and I think that that -- and  
23       the next slide is just a bunch of facts, but it's basically  
24       documents produced and how much and all that, but there's a  
25       lot, as you can see, and the next slide is real simple.

1           As the Court in the last 18 months, everybody  
2 hasn't been sitting around doing nothing, the question of  
3 patentability has been before you on 101, the question of  
4 definiteness under 112 has been before you, briefed and  
5 argued at the Markman Hearing, and the parties proposed to  
6 raise instructions have all been briefed, argued, briefed,  
7 argued, et cetera, forever.

8           And I think that taking all of that, the  
9 consideration is pretty simple that we're not in the,  
01:54PM 10 quote, "early stages of the litigation," we're actually in  
11 the late stages of litigation with discovery closing next  
12 month and a trial probably the beginning of next year.

13           Now, as we all know, this case here I think is  
14 sort of close to my heart in the sense that Google's  
15 argument about the status of the case is diminished, as  
16 this case says, by the fact that they have all caused  
17 delays, and there's no question if you look at the  
18 proceedings that have occurred, Google has delayed this  
19 case from day one with the specific strategy to file this  
01:55PM 20 motion as it is today, and why do I say that, Judge? If  
21 you look at page 14, these are the deposition notices that  
22 we noticed in July, 2020.

23           That's a year ago. Jeff Dean, who's the key  
24 culprit in this case, I tried to notice his deposition in  
25 July, and when do I finally get it? They tell me he's

1 available July 21st, two days before the close of  
2 discovery, over a year after he's noticed. There's been  
3 excuse, excuse and excuse.

4 The same thing with Patterson, with that notice  
5 July 10th, March 25th, same thing with Dean. They're all,  
6 if you look at this, you can see on the right-hand column,  
7 delay that they have done to try to obscure these  
8 depositions.

9 We noticed them way back when to get on the hook  
01:56PM 10 and start doing something, and all they've done is not  
11 produce them. And this isn't just -- this next slide is  
12 15, and it talks about Patterson and the idea that it took  
13 eight months to take his deposition, or approximately, but  
14 can you believe that the day before we take his deposition,  
15 they call up on a Friday and say he's not showing up.

16 He's not showing up because we don't like the  
17 status of the equipment that you're using for the dep,  
18 though they've known about it forever, and they want us to  
19 use Google's products to delay again another month for  
01:56PM 20 Patterson.

21 Now, Dean, Dean, as I said, we're talking about a  
22 delay here of over a year, and they give me Dean two days  
23 before the close of discovery, and then even yesterday,  
24 they're still doing it. Yesterday they send me a letter  
25 saying you can depose Dean on the 21st, which is two days

1 before the discovery for a day, but if you want take him  
2 less than a day, we can move it earlier.

3 I mean, come on, they're putting the guy down so  
4 there's zero follow-up depositions or anything to that  
5 effect. Now, we'll live with this because Bates needs a  
6 trial for that to be fair and for this thing to proceed.

7 And, finally, another example of their delay is  
8 Andrew Ng. Andrew Ng is one of the key players in this  
9 case. Ng was in charge of Google Brain. Ng is the one  
01:57PM 10 that took Bates presentations and gave it to the founder of  
11 Google.

12 Now, I tried to depose Ng. He evades service of  
13 process for like a month. He won't come out of his house.  
14 I get a new process of service guy, and he evades him for  
15 another month, another three or four days won't come out of  
16 his house, and then, meanwhile, who is he represented by?  
17 None other than Google. I call Google's counsel up, and I  
18 say what's the story? I'm going to court to get a  
19 different service because he's evading service, and what do  
01:58PM 20 they do? Oh, boom, he's available now. I mean, this is  
21 the way they act.

22 The next thing is the delay and productions of  
23 image documents. Do you realize this is a patent case, as  
24 I'm sure you're well aware of, Judge? They produced four  
25 licenses like four days ago. That's it. We've been asking

1 for damage on documents relative to amounts of money,  
2 et cetera, et cetera, and their use, et cetera. Zero have  
3 been produced to date, and there's a bunch of motions to  
4 compel already pending, so the idea that they're  
5 cooperating with discovery I think is not particularly  
6 accurate.

7 Now we get to the next issue, and that is a stay  
8 we say would not simplify the case, and this is Slide  
9 Number 19. This is, I think, an important slide.

01:59PM 10 The issues raised by Google as a defense in this  
11 case, anticipation, unpatentability, 101, 112, claim  
12 construction, et cetera, non-infringement, and obviousness.  
13 All of these will have to be tried no matter what happens  
14 in the IPR assuming it comes back.

15 This is not going to simplify anything. They're  
16 not going to give up their anticipation claim, they're not  
17 going to give up unpatentability. There's no offer to  
18 concede that the patent is valid and get rid of the  
19 validity issues on this case if they lose in the IPR, none.

02:00PM 20 And so in that circumstance, my Brother talks  
21 about this notion, as he said, well, there's this estoppel  
22 issue. Well, we know what's going to happen with that  
23 because I've been through this before is what they are  
24 going to do is say that the new art that we just filed is  
25 not really the same art or they're going to rely upon art

1 where it's like made by another that cannot be before the  
2 patent office or something to that effect, but you can bet  
3 your booties at the end of the day, if they lose, they're  
4 going to be back here on obviousness and certainly back on  
5 anticipation, which is another semi, you know, 103 type,  
6 102 argument, and the case we cite specifically is for the  
7 proposition that when that occurs, it is clear that it's  
8 not necessarily going to simplify the case.

9 And now we get to the actual decision on the IPR.

02:01PM 10 The case we cite on page 20, this flywheel case, Peloton's  
11 flywheel, et cetera, stands for the proposition that  
12 because of the SAS decision where the patent office must  
13 now consider all of the claims in the patent, the merit or  
14 the weight that is to be given in a stay motion is a lot  
15 less than it used to be.

16 As it says, the institution decision is less  
17 indicative that all claims will be found unpatentable, and  
18 the probability -- so I think it is clear given that  
19 circumstance that, in fact, just because it's been  
02:01PM 20 instituted, it's not a final decision.

21 Further, if you read the institution of it on say  
22 the '156 patent, they didn't even mention the claim at  
23 issue that's being litigated, zero, and on the '273 patent,  
24 it's just thrown in in a paragraph at the end.

25 So, I think that simply because it's issued does

1 not necessarily mean per se that, in fact, it's going to  
2 wipe out these patents come a fourth patent, and also given  
3 that, Judge, it keeps using statistics, and my Brother, I  
4 think, has a problem with statistics because he cites the  
5 statistics say to invalidate all claims of one patent, it's  
6 57 percent.

7 They have to go three for three. They have to be  
8 at bat three times and hit three singles, and it's a lot  
9 less odds to hit three singles in a row than it is simply  
02:02PM 10 just once, and I think that is applicable here, but at  
11 least it shows that these statistics are not what my  
12 Brother says they are.

13 And, finally, we talk about the prejudice that  
14 would come to Singular, and first this is page 21, and the  
15 first one is we argue that it will hinder Bates' efforts to  
16 attract and secure investments, and that's a fact, and  
17 Bates filed an affidavit. That affidavit, as you can see  
18 reading it, was not written by any lawyer, it's written  
19 straight out from Bates without a coma changed and just  
02:03PM 20 given straight to you, and according to Bates and Bates'  
21 affidavit that, in fact, having this case with Google,  
22 who's appropriated his invention, is making it very  
23 difficult.

24 And the same thing, his efforts to democratize the  
25 artificial intelligence, which my Brother doesn't mention,

1 and which, frankly, it never really -- I never appreciated  
2 frankly, to tell the truth, until I read his declaration  
3 that Bates wants to save the world besides getting his due  
4 efforts from Google, this guy is a dedicated scientist, and  
5 he's having a very difficult time trying to do it,  
6 particularly if it gets stayed.

7 And here's the other thing. The next paragraph or  
8 page is page 22. Now, this, Judge, is directed to exactly  
9 your question to my Brother, and here's the situation. The  
02:04PM 10 patent office, the PTAB rules discouraged the use of  
11 confidential information, period.

12 The rules require that the confidential  
13 information be redacted, right, to prove commercial success  
14 or to prove copying, all critical evidence is of  
15 nonobviousness. I have to prove infringement, namely that  
16 they copied the invention, et cetera.

17 They are never going to be able to do that in the  
18 IPR because all of their documents are identified as not  
19 just confidential but attorney's eyes only. There's no way  
02:05PM 20 Google is going to agree to provide me with the source code  
21 and not mark it confidential so that they can be seen, can  
22 be reviewed by the IPR people.

23 If the only way that we are going to get a fair  
24 trial in this obviousness issue is, in fact, if it's in the  
25 district court where, in fact, all of this can be before

1       the Court, namely copying, maybe Google itself doubting the  
2 invention, Google itself praising the invention, all these  
3 secondary considerations, which, as we now know, are not  
4 secondary anymore. They're as good as all the rest.

5           So, this is critical that you're not going to get  
6 a trial in the IPR that's going to allow us to put the  
7 correct evidence before, and so, obviously, if that's not  
8 prejudicial, nothing is.

9           And, finally, my Brother talked about loss of  
02:06PM 10 memory. Loss of memory, we've all been trying cases for  
11 too long, but clearly loss of memory is an issue. You  
12 delay it for three years, and I get Google's people on the  
13 witness stand or at a deposition, and it's going to be a  
14 semi-outsider barrage of memory.

15           I took the deposition, just as an example, just to  
16 tell you, of Ms. Tornabene, their IP counsel. I deposed  
17 her for 60 pages, and 40 times she says I don't remember, I  
18 don't remember, I don't remember.

19           That's going to increase, another three years,  
02:06PM 20 absolutely. And I think after that three years, people may  
21 leave. Key witnesses may leave, Ng may leave, and who  
22 knows where he's going to go, and he's certainly not going  
23 to volunteer, so to speak, to be deposed given the examples  
24 of Ng, so if you take it all together, Judge, I think  
25 clearly we're not going to get a fair trial in the IPR in

1 any sense. There's a good probability we're coming back  
2 anyways, and the time to end this case is now.

3 The time is not the delay for three years, come  
4 back and then have Google start all over between. They  
5 haven't taken any discovery, not a single deposition to  
6 date, and discovery closes in a month and a half. Not one  
7 fact discovery, and now they come in and complain, oh, we  
8 got to take 34 more depositions, therefore, why we can't  
9 stay, it will never be ready.

02:07PM 10 If they're not ready, that's their fault; if I'm  
11 not ready, that's my fault. But we intend to go up the  
12 hill and give Bates some justice because I think he needs  
13 it, and I think he deserves it given this circumstance.

14 I think these factors favor in this particular  
15 instance because in this particular instance, the  
16 commercial success and all the rest that we would prove is  
17 Google's success, and Google itself will never give us the  
18 source code to prove it. They know it.

19 For example, they wouldn't even let the slides  
02:08PM 20 come in today, let alone you think they're going to hand  
21 over the source code in the IPR, I don't think so, so I  
22 would ask the Court at the end of the day, before you make  
23 your decision that you do read in detail the declaration of  
24 Dr. Bates.

25 I ask you that, Judge, simply because he says to

1 me will the Court read it? I said, well, I'm going to ask  
2 him to read it. I think it's good for everybody to read  
3 that to see what harm will be done if we have to go off for  
4 another three years, you know, on a frolicking bear hunt.  
5 Thank you, Judge.

6 MR. KAMBER: Can I respond?

7 THE COURT: Hold on. I have one more page. I'm  
8 embarrassed to say I know who Rosie, the robot, is.

9 MR. HAYES: Unfortunately, I do, too, but we  
02:09PM 10 couldn't build them, that's the problem.

11 THE COURT: All right. Mr. Kamber.

12 MR. KAMBER: Thank you, your Honor, I'll try to be  
13 brief, but I want to address a few things that Mr. Hayes  
14 mentioned. First of all, this evidence of secondary  
15 indicia of nonobviousness is really orthogonal to the  
16 issues before the Court on the stay motion. As a legal  
17 matter, it's not even clear whether it's relevant at all to  
18 the case.

19 As the Supreme Court in the *KSR* case recognized  
02:10PM 20 that even strong evidence of secondary indicia of  
21 nonobviousness cannot overcome a strong *prima facie* case of  
22 obviousness.

23 At best, this evidence goes to the second factor  
24 regarding the likely impact or outcome of the IPRs, but  
25 even there, as I discussed before, if it's considered

1 dispositive by the PTAB and Singular prevails in the IPR  
2 proceedings, the issues will be simplified because  
3 statutory estoppel will apply.

4 With respect to the deposition scheduling issue,  
5 your Honor, frankly, I find the chart highly misleading.  
6 Those deposition notices that were served last July, they  
7 were served, and then they were withdrawn.

8 As we pointed out at the time, we hadn't even  
9 begun our document production, and what we said was we're  
02:10PM 10 happy to provide dates for some or all of these witnesses,  
11 but you have to understand that you would be going in  
12 without the documents, and you wouldn't have the ability to  
13 renoteice them or retake those depositions later on.

14 So they were withdrawn, and Google completed its  
15 ESI productions in March, and that's when depositions were  
16 renoticed, and since then, depositions have been  
17 proceeding, including as Mr. Hayes mentioned of Ms.  
18 Tornabene, of David Patterson, who's a former professor at  
19 Berkeley for many years, and Mr. Kwun is on the line, too,  
02:11PM 20 in case your Honor wants to hear about the situation with  
21 Mr. Ng.

22 Mr. Ng is a former employee who has his own  
23 startup company. He's very busy. We were not authorized  
24 to accept service on his behalf, but there is an agreement  
25 now, and his deposition is scheduled for later in June, so

1 I think there's really no issue there at that point.

2 As for Google and depositions, we've tried to  
3 handle it slightly differently. We have asked for dates  
4 for depositions for many witnesses, I think probably close  
5 to a dozen at this point. We usually just as a matter of  
6 practice try to ask for dates and then send the notice  
7 rather than send the notice and then ask for dates.

8 It's a slightly different approach, but we've  
9 asked for dates including of Dr. Bates. We haven't been  
02:12PM 10 given one yet, but I'm sure that Singular is working on  
11 that.

12 As for probabilities, everyone, of course, can use  
13 statistics to their benefit. I would note that this idea  
14 that you're supposed to multiply the probabilities and  
15 somehow get to a less than 20 percent chance of prevailing  
16 is odd in this case.

17 The claims, as your Honor knows, from the Markman  
18 proceedings are near identical across the three patents.  
19 Not surprisingly, the institution decisions are near  
02:13PM 20 identical in terms of form and format and content, so the  
21 idea that we have to go to bat and hit three singles in a  
22 row, I think is not quite right.

23 I think the more apt analogy is that three balls  
24 are being thrown at once, and we just need to swing and hit  
25 all three of them, and I think the probability based on

1 PTAB statistics is pretty high.

2 I want to address a few other things that happened  
3 there at the end of Mr. Hayes' discussion. He mentioned  
4 something about source code and the IPR. I don't frankly  
5 understand that. Source code has nothing to do with the  
6 issues in the IPR, which relate to a different piece of  
7 prior art.

8 There's no infringement aspect of the IPR  
9 proceedings, and there's no question that source code has  
02:14PM 10 been and is available to Singular for inspection. It's  
11 been so for months.

12 As for the idea that this is going to be delayed  
13 for three years, again, that's not what we're saying. This  
14 is a motion to stay this case pending a final written  
15 decision from the PTAB, which is anticipated statutorily  
16 within the next 11 months.

17 The PTAB has rarely, if ever asked, or granted  
18 itself an extension. I don't think that Singular could  
19 point to an example. It's near impossible to get, and so  
02:14PM 20 this should be wrapped up. We should know where we are in  
21 11 months, and we can in the process save the parties, save  
22 the Court, save third parties a lot of pain in the interim,  
23 and, finally, your Honor, I just want to say, none of this  
24 is to spite Dr. Bates.

25 The way this is being set up as an attack on him

1 personally, your Honor has seen enough of this to know that  
2 parties file and ask for stays in the context of IPR  
3 proceedings for obvious procedural reasons. Google does it  
4 in its cases typically, and I'm sure your Honor has seen  
5 other parties do it in your cases, and, therefore, there's  
6 a lot of law that we've cited in our briefing in support of  
7 why courts do, in fact, stay cases in this particular  
8 instance.

9                  This isn't about us trying to take away his day in  
02:15PM 10 court. The stay request is about the efficiency of the  
11 process, and I leave it to you to decide what is most  
12 efficient ultimately.

13                  THE COURT: All right. Last word, Mr. Hayes.

14                  MR. HAYES: One, couple of questions, Judge, is  
15 that a couple of points is that my Brother talks about  
16 these depositions that he noticed Google. They noticed  
17 Bates like four days ago. They waited 18 months, and they  
18 noticed it obviously for a simple reason, if you deny their  
19 motion, their plan doesn't work, but it took them 18 months  
02:16PM 20 to depose one witness through the whole case.

21                  That's a bit much, and my Brother, the source code  
22 is absolutely critical in the IPR to show secondary  
23 considerations, absolutely critical because they have to  
24 prove infringement, and they've already -- so my Brother's  
25 thing, it's got nothing to do with anything is a bit much.

1 They will oppose every single document relative to  
2 commercial success of their products in that IPR, and it  
3 will be a nightmare. Thank you.

4 THE COURT: All right.

5 MR. KAMBER: Your Honor, I hate to interject one  
6 more point, but, if I may, with respect to the noticing of  
7 the depositions, the ESI production was completed about a  
8 week ago. We did not have any documents from the ESI  
9 production from Singular until that time. We held off on  
02:17PM 10 noticing or asking for any depos because we had no  
11 documents, and we wanted and needed those before we could  
12 proceed. That might be the subject of these other  
13 extension issues, but I think that's our explanation. It  
14 has nothing to do with this motion.

15 THE COURT: All right. I'm going to rule from the  
16 bench, metaphorically, again, I'm sitting at my desk. This  
17 is a motion for a stay pending the IPR proceeding before  
18 the PTAB. Obviously, I was requested to stay this  
19 proceeding based on a request for IPR review, which I  
02:18PM 20 denied. The IPR has been instituted, which changes things  
21 somewhat.

22 These things tend to be framed as presenting one  
23 of two choices. One is that I stay everything and that we  
24 come back a year or two or three from now when everything  
25 is covered in dust and pick up again, depending on how the

1 IPR came out, and the other is to do nothing and to have  
2 these parallel proceedings which could be entirely wasteful  
3 and in some ways undermine what the IPR process is intended  
4 to do.

5 Of course, I don't know now how the IPR is going  
6 to come out. If I did, it would be easy. I have to make  
7 intelligent choices or as intelligent as I can make them  
8 along the way.

9 The IPR process is intended to provide a  
02:19PM 10 streamlining function. It also permits an opportunity for  
11 delay, particularly when litigation has begun. And delay  
12 is inevitable with any kind of stay for any period of time,  
13 and unless the PTAB invalidates the patents, it's probably  
14 not worth the candle, although it's obvious in some cases,  
15 it does, at least, offer the possibility of streamlining  
16 things.

17 Here's what I'm going to do, I'm going to try to  
18 take a middle position. I think the sensible thing to do  
19 here, and it's something of a compromise, is in simple  
02:19PM 20 terms, I want fact discovery to be completed, and then I'm  
21 going to institute a stay.

22 I think given where we are, how the parties are in  
23 high gear with all these depositions arranged, more to  
24 come, I think if I simply institute the stay and then we  
25 try to pick up where we left off next May or whenever it's

1 going to happen, there would be a great deal of wasteful  
2 effort involved in that. This effort may be wasteful as  
3 well, of course, if all the claims are invalidated, but I  
4 think it's a sensible solution, but I also want to respect  
5 the IPR process.

6 Given where we are, including the stage of the  
7 litigation, the likelihood of simplifying or eliminating  
8 the issues, and the balance of prejudice, I think some  
9 aspect of a stay makes sense.

02:20PM 10 Let me flesh this out a little bit. First, as to  
11 the standard, the IPR has instituted the proceeding. There  
12 is at least presumably some reasonable likelihood that  
13 Google will prevail. It does affect or does implicate  
14 every claim of every patent because the claim is  
15 invalidity.

16 This stage of the litigation is not as early as  
17 Google suggests or as far out along as Singular suggests,  
18 but certainly discovery is not complete.

19 The claim construction issues are pending. There  
02:21PM 20 is still quite a bit to do. No trial has been set.  
21 Unfortunately, due to the pandemic, we are quite backed up  
22 here, and this case under any scenario is not going to go  
23 to trial at the beginning of 2022 because I have wall to  
24 wall trials in other cases that have been hung up because  
25 of the pandemic between now and then, and that's just an

1 unfortunate fact.

2           The IPR, I think, does have a reasonable  
3 possibility of simplifying the issues, again, even assuming  
4 that the case survives. I don't think that it's so unduly  
5 prejudicial to Singular other than the inevitable delays  
6 that counsel is entirely granting the stay.

7           This matter does involve money damages, not  
8 injunctive relief, and I don't think there's any question  
9 that the plaintiff and the defendant are in competition  
02:22PM 10 with one another.

11           Delay is, of course, always prejudicial and  
12 unfortunate, but, again, weighing the balance here, I think  
13 the stay is in order.

14           As I indicated, I do think that fact discovery  
15 ought to be completed. It is well underway. A great deal  
16 of effort has gone into where we are so far, and I think on  
17 balance, it makes sense to complete that process. And when  
18 I say fact discovery completed, that includes, among other  
19 things, any subsequent things that flow from that,  
02:23PM 20 including any litigation concerning motions to compel or  
21 for protective orders, so it may not all be done by  
22 July 23rd, and I will not rule out extending the deadline,  
23 although I'm not prepared to do it now.

24           I would prefer to do it, if at all, for specific  
25 reasons, like a specific deposition of a specific person

1       with a specific date in mind rather than simply given the  
2       parties an open-ended license to continue fact discovery.

3                  I also think that whatever discovery has been  
4       taken in this case, if it is admissible in the IPR  
5       proceeding or would advance the interests of justice, that  
6       it ought to be used. That would be up to the PTAB to  
7       decide what they'll accept and what they'll not, but I will  
8       certainly consider, and it won't go any farther than,  
9       consider a targeted motion to rule that some particular  
02:24PM 10      piece of information should not be deemed confidential so  
11      that it can be at least attempted to be used in the PTAB.

12                  Again, I think these two processes ought not to be  
13       entirely independent of one another, and I express no view  
14       as to whether or not any particular document should be  
15       confidential or whether anything would be admissible or  
16       should be admissible in the IPR proceeding, which is up to  
17       the PTAB.

18                  And I should add, I suppose, if it makes a  
19       difference, I was struck by Dr. Bates saying he's 65 and  
02:25PM 20      he's an old man. I'm 66. I suppose he's wounding me a  
21       little bit here, but there may be people as to whom  
22       deposition testimony needs to be preserved, not simply  
23       because they're extremists but for any other reason, and I  
24       would entertain a motion to take a deposition to preserve  
25       testimony for that reason as well.

1           As far as the length of the stay, I have no  
2 intention of staying this through any appeal or for three  
3 years or any of the other doomsday scenarios. It's not at  
4 all clear I will do that, but we'll have to see how things  
5 turn out.

6           What I'm going to do is stay this case except for  
7 the completion of fact discovery and other matters that  
8 I've indicated, stay it through May 12th, 2022, which I  
9 think is the one-year anniversary from the institution of  
02:26PM 10 the IPR proceeding, if I have that date right.

11           So, again, bottom line, fact discovery to be  
12 completed in all senses, including any mopping up  
13 operations concerning motions to compel or for protective  
14 orders or anything of that sort to be completed by  
15 July 23rd unless extended.

16           I think that any fact discovery in this case  
17 should at least be let's say presumptively available for  
18 use in the IPR proceeding, again, at least from the  
19 district court standpoint, and I would consider ruling on  
02:27PM 20 matters that have been deemed confidential.

21           I do not want wholesale motions covering the  
22 waterfront, but, again, some targeted set of particular  
23 items that you think, for whatever reason, ought not  
24 properly be deemed confidential and that there's some  
25 reasonable chance that the PTAB would accept them in its

1 proceeding.

2 And let me stop there. Again, this is something  
3 of a hybrid. I make this decision with considerable  
4 reservations because I don't like delay, but, again, I also  
5 want to respect the IPR process and to try to permit an  
6 opportunity to go forward while at least minimizing delay  
7 in this proceeding.

8 Let me pause there. Mr. Kamber, any reactions or  
9 requests for clarifications?

02:28PM 10 MR. KAMBER: No, your Honor, I think we understand  
11 the Court's ruling and the middle position that you've  
12 outlined here.

13 THE COURT: Mr. Hayes.

14 MR. HAYES: No, your Honor. The only question I  
15 would have of the Court is not that. Do you know when we  
16 can we expect the status of the Markman Hearing provision?

17 THE COURT: Well, that's a good question. I guess  
18 I'm not sure the answer. Obviously, it would move the case  
19 forward to have me resolve that if there is going to be  
02:29PM 20 litigation, but it's not quite like taking depositions  
21 either. In other words, it's all been briefed and argued.

22 I guess why don't I do this. Why don't I ponder  
23 that some more. Maybe you could even file supplemental  
24 briefs. What I was going to suggest is that we reconvene  
25 maybe the second week of July or thereabouts, talk about

1 where we are in terms of wrapping up discovery, what issues  
2 remain, and we can talk about that at that point, whether  
3 you think it makes sense for me to do that. I mean, I  
4 don't know the answer to that.

5 MR. HAYES: Okay. Thanks, Judge.

6 THE COURT: Let me get a date for that. Let's  
7 see, I'm not looking at your deposition schedule here, so I  
8 don't want to interfere with anything. Let's see, how  
9 about Monday, July 12th at 4:30 eastern time?

02:30PM 10 MR. KAMBER: You said 4:30 eastern?

11 THE COURT: Yes, Monday, July 12th.

12 MR. KAMBER: I don't believe we have any  
13 depositions on the calendar for the 12th. Mr. Hayes can  
14 correct me if I'm wrong. I don't believe there's anything  
15 scheduled for that day, so that should work.

16 THE COURT: Let's do this, too. The depositions  
17 are harder to schedule than this status conference, okay,  
18 so if you need to schedule a deposition during that time  
19 period and taking into account time changes and everything,  
02:30PM 20 we'll find another time. I'd like to meet somewhere, you  
21 know, in that time frame, a week to 10 days or so before  
22 discovery closes, okay?

23 MR. KAMBER: Understood.

24 THE COURT: Feel free to contact the clerk, and we  
25 can do it very late in the day as well, you know, well, not

1       midnight. As long as I have a stenographer and a clerk  
2       present, we can handle it. Does that work for you,  
3       Mr. Hayes?

4                    MR. HAYES: That's fine, Judge.

5                    THE COURT: All right. Let's do that. I don't  
6       think I'm going to issue a written order to this effect  
7       except maybe something along the lines of, you know, bare  
8       bones stay is issued subject to completion of fact  
9       discovery as stated in open court for the reasons  
02:31PM 10      indicated, but I'm not going to write anything more  
11       complicated than that, and, again, there's probably  
12       something I'm not thinking of here, but we can take that up  
13       in July when we meet as well if you need something further.  
14       Okay.

15                  All right.

16                  MR. KAMBER: Thank you, your Honor.

17                  THE COURT: Thank you, everyone, and we will  
18       reconvene in about a month.

19                  MR. HAYES: Thank you, Judge.

02:32PM 20       THE COURT: Thank you.

21                  MR. KAMBER: Thank you.

22                  (Whereupon, the hearing was adjourned at  
23       2:32 p.m.)

24

25

C E R T I F I C A T E

3 UNITED STATES DISTRICT COURT )  
4 DISTRICT OF MASSACHUSETTS ) ss.  
5 CITY OF BOSTON )

I do hereby certify that the foregoing transcript,  
Pages 1 through 41 inclusive, was recorded by me  
stenographically at the time and place aforesaid in Civil  
Action No. 19-12551 -FDS, SINGULAR COMPUTING LLC vs. GOOGLE LLC  
and thereafter by me reduced to typewriting and is a true and  
accurate record of the proceedings.

13 Dated June 14, 2021.

14

15 s/s Valerie A. O'Hara

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17 VALERIE A. O'HARA

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